

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

This case has previously been before the Board on a different issue. The facts and circumstances as set forth in the Board's prior decision are incorporated herein by reference.² The relevant facts are as follows.

On March 3, 1986 appellant, then a 45-year-old filed a traumatic injury claim (Form CA-1) alleging on February 21, 1986 that he slipped off a pipe and fell approximately two or three feet landing on another pipe causing a lower back and hip injury while in the performance of duty. On March 24, 1986 OWCP accepted this claim for contusion and low back sprain. Appellant returned to work August 21 through December 4, 1986.

On December 4, 1986 appellant filed a claim for recurrence of disability (Form CA-2a) and alleged that he had sustained a recurrence of disability due to his February 21, 1986 employment injury. By decisions dated March 25 and October 14, 1987, January 29 and December 12, 1988, and May 31, 1989, OWCP denied his claimed recurrence of disability. Appellant appealed to the Board and by decision dated November 30, 1989, the Board remanded the case for further development of the medical evidence.³

On July 11, 1990 OWCP expanded acceptance of appellant's claim to include chronic lumbosacral strain.

By decision dated December 6, 1995, OWCP found that appellant's position as a pipefitter with wages of \$265.18 per week fairly and reasonably represented his wage-earning capacity. It reduced his wage-loss compensation benefits based on his actual earnings in this position.

On July 1, 2011 appellant's attending physician, Dr. John D. Dugan, an osteopath and a Board-certified family practitioner, diagnosed chronic pain secondary to degenerative disc disease of the lumbar spine. He noted that this condition was worsening and permanent.

In a note dated May 21, 2013, Dr. Jeffrey S. Acree, a Board-certified family practitioner, diagnosed knee osteoarthritis, and a 1986 work injury of a lumbar spine condition which resulted in worsening back pain and difficulties walking. He opined that appellant was totally disabled.

On April 21, 2014 Dr. Acree again diagnosed knee osteoarthritis and noted appellant's 1986 spine injury. He repeated his opinion that appellant had worsening back pain and could not return to work.

On July 1, 2014 OWCP referred appellant, a statement of accepted facts (SOAF), and a series of questions for a second opinion evaluation with Dr. Nicholas A. Grimaldi, an osteopath and a Board-certified orthopedic surgeon. In his August 12, 2014 report, Dr. Grimaldi described appellant's history of injury on February 21, 1986 and performed a physical examination. He found L4-5 degenerative disc disease, facet arthrosis, and anterior bone spurs from L2 to L5 on

² Docket No. 89-1500 (issued November 30, 1989).

³ *Id.*

x-rays. Dr. Grimaldi diagnosed chronic low back pain and degenerative disc disease L4-5. He opined that appellant's accepted work injuries had not resolved, as he continued to have degenerative disc disease in his back and chronic findings in his physical examination. Dr. Grimaldi found that appellant could not return to work.

In a July 12, 2016 note, Dr. Acree advised that appellant was totally disabled from work due to his chronic low back pain with arthritis, stenosis, lumbar radiculopathy, and severe degenerative changes in both knees.

On June 26, 2017 OWCP referred appellant, a SOAF, and a series of questions for a second opinion evaluation with Dr. Glenn L. Scott, a Board-certified orthopedic surgeon.

In a July 25, 2017 report, Dr. Scott reviewed the history of injury and acknowledged the SOAF. He diagnosed degenerative lumbar spine and disc disease with chronic radiculopathy, degenerative joint disease in both knee, diabetes mellitus, and chronic hypertension. Dr. Scott found that appellant's accepted work injuries of lumbar strain and lumbar contusion had not resolved and that the sequelae were still present in the form of chronic progressive degenerative lumbar spine and disc disease. He also found that appellant was not capable of returning to his date-of-injury position.

On November 29, 2018 appellant submitted a note of even date from a physician assistant. He also provided an August 9, 2018 lumbar MRI scan which demonstrated multilevel degenerative changes of the lumbar spine with progression from 2010.

In a letter dated May 9, 2019, OWCP referred appellant, a SOAF, and a series of questions for an additional second opinion evaluation with Dr. Grimaldi. In his May 30, 2019 report, Dr. Grimaldi reviewed the SOAF and noted appellant's history of injury. He reviewed appellant's diagnostic studies and diagnosed lumbar degenerative disc disease and spondylosis. In his answers to the OWCP questions, Dr. Grimaldi opined that appellant's lumbar strain and lumbar contusion had resolved. He attributed appellant's continued back pain to his disc degeneration and spondylosis. Dr. Grimaldi opined that these conditions were not due to appellant's accepted work-related conditions of strain and contusion, but were due to age-related degeneration and other nonemployment-related conditions. He found that appellant could not return to his date-of-injury position, but that his disability was not due to his accepted employment injuries.

In a letter dated July 27, 2019, OWCP notified appellant of the proposed termination of his wage-loss compensation and medical benefits. It found that Dr. Grimaldi's report was entitled to the weight of the medical evidence and established that appellant had no disability or medical residuals as a result of his accepted employment injuries. OWCP informed appellant that his case would be held open for 30 days to afford him an opportunity to submit additional evidence or argument if he disagreed with the proposed termination.

In a letter to his Congressional Representative, appellant asserted that he continued to experience back pain, that he had two bad knees, and that he used a cane to walk and was unable to drive.

By decision dated July 30, 2019, OWCP terminated appellant's wage-loss compensation and medical benefits, effective July 31, 2019. It found that the weight of the medical opinion

evidence rested with Dr. Grimaldi, who found that his employment-related disability and medical residuals had resolved.

By appeal request form postmarked October 11, 2019, appellant requested a review of the written record by a representative of OWCP's Branch of Hearings and Review.

By decision dated October 31, 2019, the hearing representative denied appellant's request for a review of the written record as untimely filed, finding that it was made more than 30 days after the July 30, 2019 merit decision as it was postmarked on October 11, 2019. The hearing representative further exercised their discretion and determined that the issue in this case could equally well be addressed by requesting reconsideration before OWCP, along with the submission of new evidence.

LEGAL PRECEDENT -- ISSUE 1

Once OWCP accepts a claim and pays compensation, it has the burden of justifying modification or termination of an employee's benefits.⁴ After it has determined that an employee has disability causally related to his or her federal employment, it may not terminate compensation without establishing that the disability has ceased or that it is no longer related to the employment.⁵ OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.⁶

The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability.⁷ To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which would require further medical treatment.⁸

ANALYSIS -- ISSUE 1

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits effective July 31, 2019, as he no longer had residuals or disability causally related to his accepted February 21, 1986 employment injury.

OWCP based its decision to terminate appellant's wage-loss compensation and medical benefits on the opinion of Dr. Grimaldi, OWCP's second opinion physician, who found that his accepted conditions of lumbosacral strain and lumbar contusion had resolved. Dr. Grimaldi reviewed appellant's diagnostic studies and concluded that the additional conditions of lumbar degenerative disc disease and spondylosis were not due to appellant's accepted work-related

⁴ *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

⁵ *I.J.*, 59 ECAB 524 (2008); *Elsie L. Price*, 54 ECAB 734 (2003).

⁶ *J.M.*, 58 ECAB 478 (2007); *Del K. Rykert*, 40 ECAB 284 (1988).

⁷ *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

⁸ *J.H.*, Docket No. 17-1916 (issued January 9, 2019); *James F. Weikel*, 54 ECAB 660 (2003).

conditions of strain and contusion, but due to age-related degeneration. He found that appellant could not returned to his date-of-injury position, but that his disability was not due to his accepted employment injuries.

The factors that comprise the evaluation of medical opinion evidence include the opportunity for and thoroughness of physical examination, the accuracy, or completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion.⁹ As Dr. Grimaldi explained his review of the medical evidence and the findings of his physical examination, his opinion provides sufficient detail to constitute a rationalized medical opinion as to why appellant's accepted employment injuries had resolved without residuals. His opinion is sufficiently probative, rationalized, and based upon a proper factual background¹⁰ and it represents the weight of the medical evidence at the time of its July 30, 2019 termination decision.¹¹ Thus, the Board finds that OWCP properly relied on Dr. Grimaldi's second opinion report and has met its burden of proof to terminate appellant's wage-loss compensation and medical benefits.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides: "Before review under section 8128(a) of this title [relating to reconsideration], a claimant for compensation not satisfied with a decision of the Secretary under subsection (a) of this section is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on [his] claim before a representative of the Secretary."¹²

Section 10.615 of Title 20 of the Code of Federal Regulations provides, "A hearing is a review of an adverse decision by a hearing representative. Initially, the claimant can choose between two formats: An oral hearing or a review of the written record."¹³ The hearing request must be sent within 30 days (as determined by postmark or other carrier's date marking) of the date of the decision for which a hearing is sought.¹⁴ OWCP has discretion, however, to grant or

⁹ *B.C.*, Docket No. 16-0978 (issued November 21, 2016); *Nicolette R. Kelstrom*, 54 ECAB 570 (2003); *Anna M. Delaney*, 53 ECAB 384 (2002).

¹⁰ *A.B.*, Docket No. 16-0480 (issued August 29, 2016).

¹¹ *C.P.*, Docket No. 15-0617 (issued August 4, 2015).

¹² 5 U.S.C. § 8124(b)(1).

¹³ 20 C.F.R. § 10.615.

¹⁴ *Id.* at § 10.616.

deny a request that is made after this 30-day period.¹⁵ In such a case, it will determine whether to grant a discretionary hearing and, if not, will so advise the claimant with reasons.¹⁶

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied appellant's request for a review of the written record as untimely filed pursuant to 5 U.S.C. § 8124.

OWCP's regulations provide that a request for review of the written record must be made within 30 days of the date of the decision for which a review is sought. Appellant's October 8, 2019 request for a review of the record was postmarked on October 11, 2019, more than 30 days after the issuance of OWCP's July 30, 2019 merit decision. Because the postmark date was more than 30 days after the date of OWCP's July 30, 2019 decision, the Board finds that the request was untimely filed and he was not entitled to a review of the written record as a matter of right.¹⁷

Although appellant was not entitled to a hearing as a matter of right, OWCP's Branch of Hearings and Review may exercise its discretion to either grant or deny a hearing following reconsideration.¹⁸ In this instance, the hearing representative denied a discretionary review of the written record because appellant could instead submit new evidence and request reconsideration before OWCP. The Board finds that the hearing representative properly exercised their discretionary authority in denying appellant's request for an oral hearing.¹⁹

The Board has held that the only limitation on OWCP's authority is reasonableness.²⁰ An abuse of discretion is generally shown through proof of manifest error, a clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from established facts.²¹ In this case, the evidence of record does not indicate that OWCP abused its discretion by denying appellant's request for a review of the written record. Accordingly, the Board finds that OWCP properly denied appellant's request for a review of the written record.

¹⁵ *G.W.*, Docket No. 10-0782 (issued April 23, 2010).

¹⁶ *Id.*

¹⁷ The 30-day period for determining the timeliness of an employee's request for an oral hearing or review commences the day after the issuance of OWCP's decision. See *Donna A. Christley*, 41 ECAB 90 (1989).

¹⁸ *D.E.*, 59 ECAB 438, 442-43 (2008); *J.C.*, 59 ECAB 206, 210-11 (2007).

¹⁹ Abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deductions from known facts. *André Thyatron*, 54 ECAB 257, 261 (2002).

²⁰ *R.M.*, Docket No. 19-1088 (issued November 17, 2020). See also *E.S.*, Docket No. 18-1750 (issued March 11, 2019).

²¹ *P.C.*, Docket No. 19-1003 (issued December 4, 2019).

CONCLUSION

The Board finds that OWCP met its burden of proof to terminate appellant's wage-loss compensation and medical benefits, effective July 30, 2019. The Board further finds that OWCP properly denied appellant's request for review of the written record as untimely, 5 U.S.C. § 8124(b).

ORDER

IT IS HEREBY ORDERED THAT the July 30 and October 31, 2019 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: August 17, 2021
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board